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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION

11 UNDRE MONTANA COLE, } Case No. CV 13-06592-DFM  
12 Plaintiff, }  
13 v. } MEMORANDUM OPINION AND  
14 CAROLYN W. COLVIN, Acting } ORDER  
15 Commissioner of Social Security, }  
16 Defendant. }

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18 Plaintiff appeals from the denial of his application for Social Security  
19 benefits. On appeal, the Court concludes that the Administrative Law Judge  
20 (“ALJ”) erred in failing to consider Plaintiff’s Department of Veterans Affairs  
21 (“VA”) disability rating. Therefore, the Court reverses the ALJ’s decision and  
22 remands to the ALJ for reconsideration.

23 **I.**

24 **FACTUAL AND PROCEDURAL BACKGROUND**

25 Plaintiff filed applications for Social Security disability insurance  
26 (“SSDI”) benefits and Supplemental Security Income (“SSI”), alleging  
27 disability beginning August 1, 2010. Administrative Record (“AR”) 24. In an  
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1 unfavorable decision, the ALJ concluded that Plaintiff was capable of  
2 performing his past relevant work as a construction laborer and was therefore  
3 not disabled. AR 32.

## 4 II.

### 5 ISSUE PRESENTED

6 The parties dispute whether the ALJ (1) improperly failed to address  
7 Plaintiff's VA rating; (2) improperly found that Plaintiff was capable of  
8 performing his past relevant work as a construction laborer; (3) improperly  
9 discredited Plaintiff's subjective symptom complaints; (4) failed to properly  
10 integrate all of Plaintiff's medically determinable impairments into the residual  
11 functional capacity ("RFC") assessment; and (5) failed to accord proper weight  
12 to the medical opinions of Plaintiff's treating physicians. See Joint Stipulation  
13 ("JS") at 3-30.

## 14 III.

### 15 DISCUSSION

16 Plaintiff alleges that the ALJ erred in failing to consider the VA's  
17 assessment of Plaintiff's disability status, dated November 14, 2011 and  
18 effective as of January 29, 2010. JS at 3-6; see AR 397-98.

19 The ALJ must "ordinarily give great weight to a VA determination of  
20 disability." McCartey v. Massanari, 298 F.3d 1072, 1076 (9th Cir. 2002)  
21 (reversing a denial of benefits because the ALJ "failed to consider the VA  
22 finding and did not mention it in his opinion"). While a VA disability decision  
23 "does not necessarily compel the SSA to reach an identical result, . . . the ALJ  
24 must consider the VA's finding in reaching his decision," because of the  
25 similarities between the VA disability program and the Social Security  
26 disability program. Id. However, because the two federal programs are not  
27 identical, "the ALJ may give less weight to a VA disability rating if he gives  
28 persuasive, specific, valid reasons for doing so that are supported by the

1 record.” Id. Furthermore, an “ALJ [is] justified in rejecting the VA’s disability  
2 rating on the basis that she had evidence the VA did not, which undermined  
3 the evidence the VA did have,” because “the acquisition of new evidence or a  
4 properly justified reevaluation of old evidence constitutes a ‘persuasive,  
5 specific, and valid reason . . . supported by the record’ under McCartey for  
6 according little weight to a VA disability rating.” Valentine v. Commissioner  
7 Social Sec. Admin., 574 F.3d 685, 695 (9th Cir. 2009).

8 Here, the VA granted Plaintiff a disability rating of 10% for  
9 “degenerative arthritis [of the] right knee joint.” AR 398. In his decision, the  
10 ALJ made no mention of the VA’s disability rating. Moreover, the ALJ found  
11 Plaintiff’s knee problems to be non-severe, discredited Plaintiff’s subjective  
12 symptom testimony as to his knee pain, and determined that Plaintiff could  
13 perform a full range of work at all exertional levels.<sup>1</sup> The Commissioner  
14 apparently concedes that the ALJ was required to address the VA rating and  
15 erred in failing to do so, but argues that any error was harmless because the  
16 ALJ referenced records from Plaintiff’s treatment at the VA and “the error  
17 does not negate the validity of the ALJ’s ultimate conclusion.” JS at 8.

18 Although an ALJ may disregard a VA rating if the ALJ considers  
19 evidence which the VA did not or if the VA rating is based upon evidence  
20 which the ALJ rejects, Valentine, 574 F.3d at 695, this presupposes that the  
21 ALJ actually considers the VA rating and provides legitimate reasons for  
22 rejecting it. Here, the ALJ did not and this failure constitutes reversible error.  
23 See Hiler v. Astrue, 687 F.3d 1208, 1212 (9th Cir. 2012) (reversing and  
24 remanding where ALJ erred in relying upon an earlier VA disability  
25 assessment and ignoring a later VA decision which found that the claimant

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27 <sup>1</sup> The only limitations included in the ALJ’s RFC assessment relate to  
28 Plaintiff’s vision problems.

1 was entitled to individual unemployability).

2 Finally, although the VA only found Plaintiff to be disabled at the 10%  
3 level, the Court is unable to find that the ALJ's error was harmless. Despite the  
4 VA's finding, the ALJ assigned Plaintiff no physical limitations whatsoever  
5 and determined that he was capable of doing past relevant work at the very  
6 heavy exertion level. AR 30-32. Without an explicit explanation for the  
7 discrepancy between the VA's finding of disability and the complete lack of  
8 RFC limitations found by the ALJ, the Court cannot affirm the ALJ's  
9 decision. See McCartey, 298 F.3d at 1076.

10 Accordingly, the case is remanded so that the ALJ may address  
11 Plaintiff's VA rating. On remand, "the ALJ is not compelled to adopt the  
12 conclusions of the VA's decisions wholesale, but if [he] deviates from final VA  
13 decisions, [he] may do so based only on contrary evidence that is 'persuasive,  
14 specific, valid' and supported by the record." Hiler, 687 F.3d at 1212 (citing  
15 McCartey, 298 F.3d at 1076).<sup>2</sup>

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23 <sup>2</sup> Because the Court finds that the ALJ's decision must be reversed on  
24 this basis, it will not address the balance of Plaintiff's contentions.  
25 Nonetheless, the Court's review of the record suggests that certain of Plaintiff's  
26 additional contentions may be meritorious and should be considered by the  
27 ALJ on appeal. For example, the Commissioner concedes that the ALJ's  
28 determination of Plaintiff's credibility was "not a model of clarity," JS at 19. It  
is therefore not the intention of the Court to limit the scope of its remand.

1 IV.  
2 **CONCLUSION**

3 For the reasons stated above, the decision of the Social Security  
4 Commissioner is REVERSED and the matter is REMANDED for further  
5 proceedings consistent with this opinion.

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7 Dated: July 7, 2014

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DOUGLAS F. McCORMICK  
11 United States Magistrate Judge  
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